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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1532

JOHN HECHINGER, *et al.*,
Appellants,

v.

DR. ROBERT MARTIN, CHAIRMAN
DISTRICT OF COLUMBIA BOARD OF
ELECTIONS AND ETHICS, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of Columbia

RESPONSE OF APPELLANTS TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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I: INTRODUCTION

(A)

This case tests for the first time the constitutionality[1] of an attempt by Congress (or any legislature) to impose the political makeup of a local council or legislative body on the voters who elect it, regardless of the political preferences of those voters.

[1] Against First and Fifth amendment standards, never before applied to this rare phenomenon in the law, voter-restriction statutes, see infra. p. 5-8.

On June 14, 1976[1a] this Court invited the Solicitor General of the United States to file a brief outlining the views of the Government on the issues in this cause. On November 24, 1976 the brief of the Solicitor General was filed. This Response of Appellants replies to the submission of the Solicitor General.

(B)

The specific issues in this cause, as raised by Appellants' Jurisdictional Statement are three: First, whether the statutory prohibition against Democrats (or members of any other political party) filling more than 50% of the at large seats[2] in the District of Columbia Council violates the First Amendment rights of Democratic voters to select Democrats as their representatives in this legislature; Second, whether the statutory exemption of independent candidates (who may fill all of the at large seats) from this same restriction, imposes an unconstitutional discrimination against partisan voters and party candidates; Third, whether the "one-man, one vote" principles of *Reynolds v. Sims*, 377 U.S. 533 is violated by this voter-restriction statute, under which the District's 76.55% Democrats are limited to 50% of the at large seats,[3] regardless of the makeup of the remainder of the Council.[4]

[1a] The procedural steps below were set forth in Appellants' Jurisdictional Statement filed April 23, 1976. Motions to dismiss or affirm were filed by the Defendants below on May 20 and 24, 1976. Appellants replied on June 8, 1976. As noted in the text, This Court then, on June 14, requested a Brief from the Solicitor General.

[2] Section 401(b)(3) of the Home Rule Bill restricted any political party to no more than 2 of the 4 at large seats on the Council in the original election in 1974. Since the Chairman of the Council is also elected at large, Section 401(d)(3) restricts that no more than 3 of the 5 representatives elected at large shall be from one party. In each election no more than 50% of the at large seats to be filled in that election may be filled by one party. This Brief refers to the 50% limitation found in Section 401(b)(3) because it is the one that faces voters in each election. Each argument, obviously, also goes equally to 401 (d)(3) where the restriction on any party is to fill no more than 60% of the at large elected posts in the Council, including the Chairman.

In their Jurisdictional Statement Appellants warned the Court that this statute poses a benchmark examination of legislative intrusion into a hitherto forbidden area: dictation by legislative fiat the political makeup of elected local legislative bodies. In the Jurisdictional Statement Appellants also pointed out the constitutional novelty of dictating to voters whom they may vote for to represent them, and whom they may not, doing so entirely on the basis of a flat statutory prohibition against voting for candidates of specified political beliefs. In consequence, Appellants pointed out, that this Court, in the strange new world of voter-restriction statutes, would be inevitably propelled into a maelstrom of political decisions, none of which are in this Court's proper domain, but all of which would become this Court's business.[5]

All of these considerations were ignored by the Solicitor General. Rather, his brief chose to contend that (1) the

[3] In each election such as the one that occurred on November 2nd, 1976, under the provisions of 401(b)(3).

[4] The prohibition against Democrats (or members of any other party) from filling more than two of the four at large seats applies even if the eight ward seats happen to be evenly split between the parties. At that point this supposed protection for minority parties would become a veto against assumption of majority control and purpose by *any* party.

[5] Appellants' Jurisdictional Statement, 18-26.

unique (in his view) constitutional status of the District of Columbia permits this form of experimentation by Congress with the voting rights of District residents,[5a] (2) the outcome herein is "controlled" by prior case law,[5b] and (3) various other forms of statutory voting rules provide a constitutional basis for Congress' dictation of representation to District voters, regardless of what these voters desire.[5c] This submission will go to each contention, seriatim.

II: DISCUSSION

(A)

In a series of striking statements, the Solicitor General demonstrates his belief that residents of the District of Columbia hold second class constitutional rights to political expression and choice. Witness, if the Court will:

> "Because the District is the seat of the federal government, and because of the peculiar needs for cooperation among District officials, Congress, and the President in the governance of the District, it is singularly appropriate that the District's legislative body not be comprised of adherents to but a single political party."
> (Br. Sol. Gen., 6)

Thus, if one is to accept this view, political expression by residents of the District of Columbia is subjected to "appropriate" restrictions not shared with voters anywhere else. Further:

> "We submit that the plan Congress devised is no more open to attack because of its reasonable limi-

5a Br. Sol. Gen., 5-7.

5b Ibid, 7-9.

5c Ibid, 9-14.

> tation on the ability of the majority party to capture all of the seats than it is open to attack because of its limitations on the scope of the Council's legislative powers or the fact that Congress can set aside its decision." (Br. Sol. Gen., 7)

Thus, if one is to believe the Solicitor General, Congress' restrictions on the legislative powers of the D.C. Council are, in some way, equated with Congress' right to restrict the political belief and party of persons who represent District voters in their legislature – whatever its powers.[6]

These views are constitutional aberrations repugnant to basic notions of voting fairness. They are equally repugnant to all citizens – of whatever political stamp – of the District of Columbia. Appellants urge that once Congress enacted into law political, partisan elections to the legislature of the District of Columbia such political, partisan elections are subject to the same constitutional safeguards that govern political elections anywhere in this country. Congress cannot constitutionally enact political elections for District residents and then impose unconstitutional restrictions on such elections. It could not, for instance, provide for political elections to the District legislature and then decree that only Democrats, or only whites, or only property-owners could sit in this legislature. Nor can Congress provide political elections for the District of Columbia legislature and then, for whatever reason, decree in its benign wisdom the political makeup of that legislature.

6 "Moreover the D.C. Home Rule Act stands on a special footing because of the plenary power of Congress over the District's affairs and the fact that Congress has retained the ultimate legislative power over the District" (Br. Sol. Gen., 14); that plenary power, Appellants submit, does not supersede the First and Fifth Amendments which remain in force for all District of Columbia residents.

That is precisely what has been done here in a wholly unique statute of a kind that his Court has never before scrutinized for First and Fifth Amendment violations. These violations are improperly laundered in the wash of the new provincialism accorded the constitutional rights of District residents, when the Solicitor General concludes:

> "We submit that the Act is consistent with the Constitution; the majority has no constitutional right to reap over-representation at the expense of the minority, and Congress should not be consigned to ward elections or proportional representation as the only permissible devices for attempting to counteract the disadvantages of at large elections." (Br. Sol. Gen., 12)

Putting aside a highly legitimate inquiry into what the precise mechanics of "over-representation" of the majority in the routine activities of a freely-elected local legislature might be,[7] the essential question in this case is not the rights of the majority *qua* majority. The heart question is the right of the individual voter to vote his political belief in a partisan election for representatives to his own legislature. And a statute denying that right in the way that this statue does has never been before this Court for review. The fact that this denial forms a part of the Home Rule law for the District of Columbia does not transform this denial of political rights protected under the First Amendment into anything else. That is, of course, unless

[7] The Solicitor General notes that Democrats now hold 84.6% of the seats in the District of Columbia Council (Br. Sol. Gen., 3). But he also admits that "Today's political majority may be tomorrow's minority" (Br. Sol. Gen., 10). What will remain unchanged, however, is the restrictions found in this statute, no matter what the future outcome of the eight ward rules might be.

the First Amendment has been repealed for residents of the District of Columbia.

(B)

The Solicitor General states that this case is controlled by *Blaikie v. Power*, 13, N.Y. 2d 134, 375 U.S. 439.[8] If the statute in Blaikie were the same as the one before the Court now (which it is not),[9] if the First and Fifth Amendment arguments in this case had been made to the Court below in *Blaikie* (which they were not),[10] and if these same arguments had been placed before this Court on Appeal[11] (which

[8] Br. Sol. Gen., 7.

[9] Unlike the present case, independent candidates were restricted in *Blaikie*, Section 1200, 22 C, New York City Charter.

[10] Judge Fuld's opinion below in *Blaikie* concerned itself with whether the contested provision of the New York City Charter violated a specific provision of the *New York State* constitution. There is no discussion of First Amendment issues (very different from those raised under the New York provision) whatever, nor was the issue of discrimination against partisan belief or party candidates present in *Blaikie*.

[11] In the Briefs to this Court Blaikie raised "due process" and "equal protection" arguments based on "an unreasonable discriminatory provision denying New York City voters the right to vote for all elected officials in contrast to voters elsewhere in New York. Although the inhibition against party candidates running for all open seats is, in fact, noted in his Brief, Blaikie nowhere developed this argument, it is not touched in Judge Fuld's opinion nor in the response in this Court of the City of New York. One may fairly say that the First Amendment problems raised in *Hechinger* were not examined in *Blaikie*, and Fifth Amendment discrimination against parties on belief and party candidates simply was not an issue under the New York City Charter provision there under dispute.

they were not), the Solicitor General would be right. But he is not. The issues and result in both *Blaikie* and *Lo Frisco v. Schaffer*, 341 F. Supp. 743 (D.C. Coun.), 409 U.S. 972 were discussed in the Jurisdictional Statement (p. 16-17). It was therein stated that if this Court wishes to embark on the treacherous waters of adjudicating voter-restriction statutes for reasonableness (or on any other yardstick against which constitutional deprivation can be weighed) nothing in either *Blaikie* or any other case provides precedent. This case, *Hechinger*, will be the license for legislatures to impose voting restrictions on local electorates because it is in *Hechinger* that the constitutional questions raised by such statutes are first raised. No fair reading of any other case, be it *Blaikie* or *Lo Frisco*, neither below, certainly not in the briefs to this Court, nor in the one sentence opinions here, justifies this court's taking on a far-reaching political function for which it is not suited – without briefing and careful questioning as to whether it is constitutionally proper for it to do so. And such briefing and questioning would also go to the Pandora's Box of related problems let loose on future legislatures and courts, discussed in detail in the Jurisdictional Statement,[12] but quite ignored by the Solicitor General.

As to the other cases cited in the Solicitor General's second argument[12aa] it is appropriate to note that in none of them was a single voter denied the right to vote for any elected official, at any level, local, state or national. *Gaf-*

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12 That only two of the 12 Council seats are fenced off from the free exercise of the political franchise simply means that this statute is only slightly impregnated with unconstitutionality.

12aa Br. Sol. Gen., 7-9.

fney[12a] and its progeny are all apportionment cases in which the issue was whether individual votes counted equally, or reasonably equally, in the election of state officials. And as pointed out in the Jurisdictional Statement (Juris. St. 17) the language of *Gaffney* itself makes it very clear that when:

> "political groups have been fenced out of the political process and their voting strength invidiously minimized"[12b]

voting plans run afoul of the Constitution. The Democratic Party of the District of Columbia could not be more effectively fenced out of access to 50% of the at large seats in the Council[13] than it has been under this statute. And that remains true no matter what the makeup of the remainder of the Council might be.

There is no judicial precedent for Congress' dictate to the voters of the District that they cannot vote their political beliefs for 50% of the at large representatives on their own Council. There is no judicial precedent for Congress' exemption of independent candidates from this restriction. This statute is unique in the annals of the law. Review of it by this Court is a first.

12a *Gaffney v. Cummings*, 412 U.S. 735, (cited at Br. Sol. Gen., 8, 9); this same distinction applies with equal force to cases supposedly supporting the Solicitor General's third argument (infra, 8-10).

12b 412 U.S. at 754.

13 The statute herein achieves precisely the reverse of the statute in *Gaffney;* rather than "fairly to allocate political power to the parties in accordance with their voting strength" (Gaffney, 412 U.S. at 254) the District statute allocates the at large seats in the Council as Congress, not the voters, deems desirable.

(C)

The third argument of the Solicitor General seems to be this: Congress has a legitimate concern in the expresssion of minority views in the District of Columbia Council and the constitution permits sufficient flexibility in voting regulations to permit this statute's mode of satisfying that concern.[14]

No one disputes that expression of minority views in *any* legislature is a desirable social goal, whether in the states or here in Washington. But it is a vast constitutional leap from desirable social goals to legitimate areas for legislation. The proof of that truism lies in the cases offered by the Solicitor General in support of the constitutionality of this attempt to legislate public virtue. They all are apportionment cases (or cases related thereto) which do not touch the problem in *Hechinger*. None of them approaches approval by this Court – or any Court – of a statute dictating the politics of elected local legislators.[15] In *Sailors v. Board of Education*[16] and *Gordon v. Lance*,[17] no one was denied a vote for anything. *Sailors* held that Michigan's county boards of educa-

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14 Br. Sol. Gen. 9-14.

15 There are other ways for Congress to insure a broad spectrum of expression in the District of Columbia Council without running afoul of the Constitution. Appellants do not here dispute the constitutionality of non-partisan elections. Nor do they contest the propriety of true proportional representation, where every voter may vote his political preferences. The statute in this case, however, is neither. It is a misplaced attempt to transplant fixed political make-up from appointive bodies (such as the federal executive agencies) to elected legislative bodies.

16 387 U.S. 105 cited at Br. Sol. Gen., 10.

17 403 U.S. 1 Ibid, 11.

tion, *non-legislative* bodies, could constitutionally be appointed, not elected. *Gordon* ruled that West Virginia's 60% voting requirement for the approval of bond issues did not violate the one-man, one-vote rubric. *East Carroll v. Marshall*,[18] *Chapman v. Meier*[19] and *Mahan v. Howell*[20] were, again, strict apportionment cases, testing whether the mathematical departure in each from absolute voter equality was constitutional. None of them dealt with statutes that dictate the political makeup of any part of a legislature; in none of them was a single voter denied the right to vote his politics for any elective office.

Finally, the Solicitor General's comment on *Dallas County v. Reese*,[21] *Fortson v. Dorsey*[22] and *Dusch v. Davis*[23] is ample proof that flexible apportionment falls worlds short of political dictation to voters. Those cases involved statutes imposing residence requirements on candidates, a restriction as old as voting itself. The issue in each was whether reasonable equality of individual votes was affected by these Republican, or a Prohibitionist, or holder of any other political belief. None of this Court's decisions in multiple-member (or at large) voting cases involved the specific, direct denial of political preference found in *Hechinger*.

When the Solicitor General states in his subsequent comments on these cases that under this statute now in controversy here in the District of Columbia:

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18 424 U.S. 636, Ibid, 12.

19 420 U.S. 1, Ibid, 12.

20 410 U.S. 315, Ibid, 12.

21 421 U.S. 477, Ibid, 13.

22 379 U.S. 433, Ibid, 13.

23 387 U.S. 112, Ibid, 12.

"no voter is disfranchised" (Br. Sol. Gen. 13)

this simply is not so. The undersigned and 208,000 other Democrats in this city were forced by law to vote for a Republican or a Statehood supporter on November 2nd last. That is what disenfranchisement is all about. If it is not, then the millions who regularly vote 99% majorities in support of a chosen Government slate in East European elections are similarly not "disfranchised." But both there and here the voters' political preference is denied them.

Immediately thereafter the Solicitor General adds that no voter is:

> "within this limitation: (the statute)
> "prevented from expressing his views"
> (Br. Sol. Gen. 13)

That statement is just as wrong. Those same Democrats had their political views absolutely, totally stifled in the election of 50% of the at large Councilmen on November 2nd, and will have those views stifled in every future election.

It is a total distortion, indeed a reverse twisting, of reapportionment cases to contend that any of them stands as precedent supporting the statute herein. Every apportionment case that reached this Court and every decision of the Court in these cases sought to establish a rough, reasonable equality for all votes to elected office, local, state or national. Now a statute intervenes to prohibit members of a political party from voting their politics in a political election for seats in an elected, legislative body. That is one-man, *no*-vote for members of that party. And that disenfranchised party, which today in the District of Columbia is the Democratic Party, may tomorrow be any Party.

(D)

Appellants point out to the Court that on October 4, 1976 it noted probable jurisdiction in *Mandel v. Bradley* (No. 76-1287). Bradley's issues and those in Hechinger are parallel: Bradley, an independent candidate, contends he was denied First and Fourteenth Amendment rights by being forced to file his petitions earlier than were party candidates. This is the obverse side of the discriminatory exemption (against Party voters and candidates) given independent candidates and voters under the District of Columbia statute. Further, both *Bradley* and *Hechinger* raise similar questions regarding the precise meaning of prior summary decisions by this Court. It is respectfully submitted that concurrent briefing and argument in both *Bradley* and *Hechinger* would provide the Court a useful opportunity to set forth in detail the constitutional guidelines in this hitherto uncharted area of voter restrictions.

III: CONCLUSION

The brief of the Solicitor General offers little help to the Court in considering this troublesome new voter restriction. What has been done in the Solicitor General's brief is an attempt to allay the Court of anxieties regarding the Court's own function, if it chooses to summarily affirm the Court below. But the problems will remain. If this statute stands, the Court moves squarely into the business of determining on a case-by-case basis what is reasonable representation for minority parties who cannot secure this representation at the polls. If this statute stands, the Court will have approved for the first time a dictate by Congress and by any state legislature to the individual voter, telling him how he can vote in a political election for his local legislature, and how he cannot. If this statute stands, the Court will have

taken on the mantle of superior wisdom, as did the Congress, wisdom superior to the expressed political beliefs of the voters as to who will best represent thm. This is an awesome departure for this Court. It arises, inevitably, from an unprecedented legislative intrusion into the purely political decisions made throughout our history (until now) within the conscience of individual voters.

Neither the locale of this departure, the District of Columbia, nor any prior decisions of this Court justify this departure.

Appellants therefore urge the Court to note probable jurisdiction in this cause, set it down for briefing and argument and thereupon to declare Sections 401 (b)(3) and 401 (d)(3) of the District of Columbia Home Rule Act unconstitutional as repellant to both the First and Fifth Amendments to the Federal Constitution.

Respectfully submitted,

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